



Senate

General Assembly

File No. 737

January Session, 2015

Substitute Senate Bill No. 979

Senate, April 23, 2015

The Committee on Judiciary reported through SEN. COLEMAN of the 2nd Dist., Chairperson of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING THE CONNECTICUT UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective October 1, 2015*) Sections 1 to 12,
2 inclusive, of this act may be cited as the "Connecticut Uniform
3 Fiduciary Access to Digital Assets Act".

4 Sec. 2. (NEW) (*Effective October 1, 2015*) As used in sections 1 to 12,
5 inclusive, of this act:

6 (1) "Account holder" means (A) a person that has entered into a
7 terms of service agreement with a custodian, or (B) a fiduciary for such
8 person;

9 (2) "Agent" means an attorney in fact who is granted authority
10 under a durable or nondurable power of attorney;

11 (3) "Carries" means engages in the transmission of electronic
12 communications;

13 (4) "Catalog of electronic communications" means information that
14 identifies each person with which an account holder has had an
15 electronic communication, the time and date of the communication,
16 and the electronic address of the person;

17 (5) "Conservator" means (A) a conservator, as defined in subsection
18 (a) of section 45a-644 of the general statutes, who is appointed by a
19 court to manage the estate of a living adult individual, (B) a
20 conservator granted voluntary representation of an individual
21 pursuant to section 45a-646 of the general statutes, or (C) a temporary
22 conservator appointed pursuant to section 45a-654 of the general
23 statutes;

24 (6) "Conserved person" means an individual for whom a
25 conservator has been appointed. "Conserved person" includes a
26 respondent, as defined in section 45a-644 of the general statutes, for
27 whom an application for the appointment of a conservator is pending;

28 (7) "Content of an electronic communication" means information
29 concerning the substance or meaning of the communication which:

30 (A) Has been sent or received by an account holder;

31 (B) Is maintained in electronic storage by a custodian providing an
32 electronic communication service to the public or is carried or
33 maintained by a custodian providing a remote computing service to
34 the public; and

35 (C) Is not readily accessible to the public;

36 (8) "Court" means a court of competent jurisdiction, including, but
37 not limited to, the Probate Court or the Superior Court;

38 (9) "Custodian" means a person that carries, maintains, processes,
39 receives or stores a digital asset of an account holder;

40 (10) "Digital asset" means a record that is electronic. "Digital asset"
41 does not include an underlying digital asset or liability unless the

42 digital asset or liability is itself a record that is electronic;

43 (11) "Electronic" means relating to technology having electrical,
44 digital, magnetic, wireless, optical or electromagnetic capabilities or
45 similar capabilities;

46 (12) "Electronic communication" has the same meaning as provided
47 in 18 USC 2510(12), as amended from time to time;

48 (13) "Electronic communication service" means a custodian that
49 provides to an account holder the ability to send or receive an
50 electronic communication;

51 (14) "Executor" means an executor, administrator, special
52 administrator or temporary administrator of an estate or any person
53 who performs substantially the same function as such executor,
54 administrator, special administrator or temporary administrator under
55 the laws of this state other than sections 1 to 12, inclusive, of this act;

56 (15) "Fiduciary" means an original, additional or successor executor,
57 or a conservator, agent or trustee;

58 (16) "Information" means data, text, images, videos, sounds, codes,
59 computer programs, software, databases or the like;

60 (17) "Person" means an individual, estate, trust, business or
61 nonprofit entity, public corporation, government or governmental
62 subdivision, agency or instrumentality or other legal entity;

63 (18) "Power of attorney" means a record that grants an agent
64 authority to act in the place of a principal;

65 (19) "Principal" means an individual who grants authority to an
66 agent in a power of attorney;

67 (20) "Record" means information that is inscribed on a tangible
68 medium or that is stored in an electronic or other medium and is
69 retrievable in perceivable form;

70 (21) "Remote computing service" means a custodian that provides to
71 an account holder computer processing services or the storage of
72 digital assets by means of an electronic communications system, as
73 defined in 18 USC 2510(14), as amended from time to time;

74 (22) "Terms of service agreement" means an agreement that controls
75 the relationship between an account holder and a custodian;

76 (23) "Trustee" means a fiduciary with legal title to property under a
77 will or pursuant to an agreement or declaration that creates a beneficial
78 interest in another person. "Trustee" includes a successor trustee; and

79 (24) "Will" includes a codicil, a testamentary instrument that only
80 appoints an executor and an instrument that revokes or revises a
81 testamentary instrument.

82 Sec. 3. (NEW) (*Effective October 1, 2015*) (a) Sections 1 to 12, inclusive,
83 of this act apply to:

84 (1) An agent acting under a power of attorney executed before, on
85 or after October 1, 2015;

86 (2) An executor acting for a decedent who died before, on or after
87 October 1, 2015;

88 (3) A conservator acting in a conservatorship proceeding, whether
89 pending in a court or commenced before, on or after October 1, 2015;

90 (4) A trustee acting under a trust created before, on or after October
91 1, 2015; and

92 (5) Any proceeding filed in a court prior to October 1, 2015,
93 pursuant to section 45a-334a of the general statutes, revision of 1958,
94 revised to January 1, 2015, that is pending on October 1, 2015.

95 (b) Sections 1 to 12, inclusive, of this act do not apply to a digital
96 asset of an employer used by an employee in the ordinary course of
97 the employer's business.

98 Sec. 4. (NEW) (*Effective October 1, 2015*) Subject to the provisions of
99 subsection (b) of section 8 of this act and unless otherwise ordered by
100 the court or provided in the will of a decedent, the executor of the
101 decedent has the right to access:

102 (1) The content of an electronic communication that the custodian is
103 permitted to divulge under the Electronic Communications Privacy
104 Act, 18 USC 2702(b), as amended from time to time;

105 (2) Any catalog of electronic communications sent or received by the
106 decedent; and

107 (3) Any other digital asset in which at death the decedent had a
108 right or interest.

109 Sec. 5. (NEW) (*Effective October 1, 2015*) Subject to the provisions of
110 subsection (b) of section 8 of this act, the court, after notice and
111 personal service in the manner prescribed under subsection (a) of
112 section 45a-649 of the general statutes for matters under chapter 802h
113 of the general statutes, and an opportunity for a hearing in the manner
114 prescribed in sections 45a-645a to 45a-645c, inclusive, of the general
115 statutes, a court may grant a conservator the right to access:

116 (1) The content of an electronic communication that the custodian is
117 permitted to divulge under the Electronic Communications Privacy
118 Act, 18 USC 2702(b), as amended from time to time;

119 (2) Any catalog of electronic communications sent or received by the
120 conserved person; and

121 (3) Any other digital asset in which the conserved person has a right
122 or interest.

123 Sec. 6. (NEW) (*Effective October 1, 2015*) (a) To the extent a power of
124 attorney expressly grants an agent authority over the content of an
125 electronic communication of the principal and subject to the provisions
126 of subsection (b) of section 8 of this act, the agent has the right to access
127 the content of an electronic communication that the custodian is

128 permitted to divulge under the Electronic Communications Privacy
129 Act, 18 USC 2702(b), as amended from time to time.

130 (b) Subject to the provisions of subsection (b) of section 8 of this act
131 and unless otherwise ordered by the court or provided by a power of
132 attorney, an agent has the right to access:

133 (1) Any catalog of electronic communications sent or received by the
134 principal; and

135 (2) Any other digital asset in which the principal has a right or
136 interest.

137 Sec. 7. (NEW) (*Effective October 1, 2015*) (a) Subject to the provisions
138 of subsection (b) of section 8 of this act and unless otherwise ordered
139 by the court or provided in a trust instrument, a trustee that is an
140 original account holder has the right to access any digital asset held in
141 trust, including any catalog of electronic communications of the trustee
142 and the content of an electronic communication.

143 (b) Subject to the provisions of subsection (b) of section 8 of this act
144 and unless otherwise ordered by the court or provided in a trust
145 instrument, a trustee that is not an original account holder has the
146 right to access:

147 (1) The content of an electronic communication that the custodian is
148 permitted to divulge under the Electronic Communications Privacy
149 Act, 18 USC 2702(b), as amended from time to time;

150 (2) Any catalog of electronic communications sent or received by the
151 original or any successor account holder; and

152 (3) Any other digital asset in which the original or any successor
153 account holder has a right or interest.

154 Sec. 8. (NEW) (*Effective October 1, 2015*) (a) A fiduciary that is an
155 account holder or has the right under sections 1 to 12, inclusive, of this
156 act to access a digital asset of an account holder:

157 (1) Subject to the terms of service agreement, copyright law and
158 other applicable law, may take any action concerning the digital asset
159 to the extent of the account holder's authority and the fiduciary's
160 power under the law of this state other than sections 1 to 12, inclusive,
161 of this act;

162 (2) Has, for the purpose of applicable electronic privacy laws, the
163 lawful consent of the account holder for the custodian to divulge the
164 content of an electronic communication to the fiduciary; and

165 (3) Is, for the purpose of applicable computer fraud and
166 unauthorized computer access laws, including, but not limited to,
167 section 53a-251 of the general statutes, an authorized user of such
168 digital asset and is authorized to access such digital asset.

169 (b) Unless an account holder, after October 1, 2015, agrees to a
170 provision in a terms of service agreement that limits a fiduciary's
171 access to a digital asset of the account holder by an affirmative act
172 separate from the account holder's assent to other provisions of the
173 agreement:

174 (1) The provision is void as against the strong public policy of this
175 state; and

176 (2) The fiduciary's access under sections 1 to 12, inclusive, of this act
177 to a digital asset does not violate the terms of service agreement even if
178 the agreement requires notice of a change in the account holder's
179 status.

180 (c) A choice of law provision in a terms of service agreement is
181 unenforceable against a fiduciary acting under sections 1 to 12,
182 inclusive, of this act to the extent the provision designates law that
183 enforces a limitation on a fiduciary's access to a digital asset, and the
184 limitation is void under subsection (b) of this section.

185 (d) As to tangible personal property capable of receiving, storing,
186 processing or sending a digital asset, a fiduciary with authority over
187 the property of a decedent, conserved person, principal or settlor:

188 (1) Has the right to access the tangible personal property and any
189 digital asset stored in the tangible personal property; and

190 (2) Is an authorized user of such digital asset and is authorized to
191 access such digital asset for the purposes of any applicable computer
192 fraud and unauthorized computer access laws, including, but not
193 limited to, section 53a-251 of the general statutes.

194 Sec. 9. (NEW) (*Effective October 1, 2015*) (a) If a fiduciary with a right
195 under sections 1 to 12, inclusive, of this act to access a digital asset of
196 an account holder complies with subsection (b) of this section, the
197 custodian shall comply with the fiduciary's request in a record for:

198 (1) Access to the digital asset;

199 (2) Control of the digital asset; and

200 (3) A copy of the digital asset to the extent permitted by copyright
201 law.

202 (b) If a request under subsection (a) of this section is made by:

203 (1) An executor with the right of access under section 4 of this act,
204 the request must be accompanied by a certificate of appointment of the
205 executor or court order;

206 (2) A conservator with the right of access under section 5 of this act,
207 the request must be accompanied by a court certified order that gives
208 the conservator authority over the digital asset;

209 (3) An agent with the right of access under section 6 of this act, the
210 request must be accompanied by an original or a copy of the power of
211 attorney that authorizes the agent to exercise authority over the digital
212 asset and a certification of the agent, under penalty of perjury, that the
213 power of attorney is in effect; and

214 (4) A trustee with the right of access under section 7 of this act, the
215 request must be accompanied by an original or a copy of the trust
216 instrument or a certification of trust under subsection (d) of this section

217 that authorizes the trustee to exercise authority over the digital asset.

218 (c) A custodian shall comply with a request made under subsection
219 (a) of this section not later than sixty days after receipt of the request. If
220 the custodian fails to comply with such request, the fiduciary may
221 apply to the court for an order directing compliance.

222 (d) Instead of furnishing a copy of the trust instrument under
223 subdivision (4) of subsection (b) of this section, the trustee may
224 provide a certification of trust. The certification:

225 (1) Must contain the following information:

226 (A) That the trust exists and the date the trust instrument was
227 executed;

228 (B) The identity of the settlor;

229 (C) The identity and address of the trustee;

230 (D) A statement that there is nothing inconsistent in the trust with
231 respect to the trustee's powers over digital assets;

232 (E) A statement of whether the trust is revocable and the identity of
233 any person holding a power to revoke the trust;

234 (F) A statement of whether a cotrustee has authority to sign or
235 otherwise authenticate; and

236 (G) Whether all or fewer than all cotrustees are required to exercise
237 powers of the trustee;

238 (2) Must be signed or otherwise authenticated by a trustee;

239 (3) Must state that the trust has not been revoked, modified or
240 amended in a manner that would cause the representations contained
241 in the certification of trust to be incorrect; and

242 (4) Need not contain the dispositive terms of the trust.

243 (e) A custodian that receives a certification of trust under subsection
244 (d) of this section may require the trustee to provide copies of excerpts
245 from the original trust instrument and later amendments designating
246 the trustee and conferring on the trustee the power to act in the
247 pending transaction.

248 (f) A custodian that acts in reliance on a certification of trust under
249 subsection (d) of this section without knowledge that the
250 representations contained in the certification of trust are incorrect is
251 not liable to any person for so acting and may assume without inquiry
252 the existence of facts stated in the certification of trust.

253 (g) A person that in good faith enters into a transaction in reliance
254 on a certification of trust under subsection (d) of this section may
255 enforce the transaction against the trust property as if the
256 representations contained in the certification of trust were correct.

257 (h) A person that demands the trust instrument in addition to a
258 certification of trust under subsection (d) of this section or excerpts
259 under subsection (e) of this section is liable for damages, including
260 attorneys' fees, if the court determines that the person did not act in
261 good faith in demanding the trust instrument or excerpts.

262 (i) This section does not limit the right of a person to obtain a copy
263 of a trust instrument in a court proceeding concerning the trust.

264 Sec. 10. (NEW) (*Effective October 1, 2015*) A custodian and its officers,
265 employees and agents are immune from liability for an act or omission
266 done in good faith in compliance with sections 1 to 12, inclusive, of this
267 act.

268 Sec. 11. (NEW) (*Effective October 1, 2015*) In applying and construing
269 sections 1 to 12, inclusive, of this uniform act, consideration must be
270 given to the need to promote uniformity of the law with respect to its
271 subject matter among states that enact it.

272 Sec. 12. (NEW) (*Effective October 1, 2015*) Sections 1 to 12, inclusive,
273 of this act modify, limit or supersede the Electronic Signatures in

274 Global and National Commerce Act, 15 USC 7001 et seq., but do not
 275 modify, limit or supersede Section 101(c) of said act, 15 USC 7001(c) or
 276 authorize electronic delivery of any of the notices described in Section
 277 103(b) of said act, 15 USC 7003(b).

278 Sec. 13. Section 45a-334a of the general statutes is repealed. (*Effective*
 279 *October 1, 2015*)

This act shall take effect as follows and shall amend the following sections:		
Section 1	<i>October 1, 2015</i>	New section
Sec. 2	<i>October 1, 2015</i>	New section
Sec. 3	<i>October 1, 2015</i>	New section
Sec. 4	<i>October 1, 2015</i>	New section
Sec. 5	<i>October 1, 2015</i>	New section
Sec. 6	<i>October 1, 2015</i>	New section
Sec. 7	<i>October 1, 2015</i>	New section
Sec. 8	<i>October 1, 2015</i>	New section
Sec. 9	<i>October 1, 2015</i>	New section
Sec. 10	<i>October 1, 2015</i>	New section
Sec. 11	<i>October 1, 2015</i>	New section
Sec. 12	<i>October 1, 2015</i>	New section
Sec. 13	<i>October 1, 2015</i>	Repealer section

Statement of Legislative Commissioners:

Section 9 was amended to change "certification" to "certification of trust" for consistency, and section 9(h) was amended to add "or excerpts" for accuracy.

JUD *Joint Favorable Subst. -LCO*

The following Fiscal Impact Statement and Bill Analysis are prepared for the benefit of the members of the General Assembly, solely for purposes of information, summarization and explanation and do not represent the intent of the General Assembly or either chamber thereof for any purpose. In general, fiscal impacts are based upon a variety of informational sources, including the analyst's professional knowledge. Whenever applicable, agency data is consulted as part of the analysis, however final products do not necessarily reflect an assessment from any specific department.

OFA Fiscal Note

State Impact: None

Municipal Impact: None

Explanation

The bill gives fiduciaries access to a represented person's digital assets and does not result in a fiscal impact to the state or municipalities.

The Out Years

State Impact: None

Municipal Impact: None

OLR Bill Analysis**SB 979*****AN ACT CONCERNING THE CONNECTICUT UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT.*****SUMMARY:**

This bill establishes the "Connecticut Uniform Fiduciary Access to Digital Assets Act," extending a fiduciary's existing authority over a represented person's tangible assets to include such person's digital assets (i.e., electronic records). The bill specifies the conditions under which fiduciaries have the right to access digital assets. It applies to four types of fiduciaries, regardless of when their authority became effective:

1. executors or administrators of deceased persons' estates,
2. court-appointed guardians or conservators of protected persons' estates,
3. agents appointed under powers of attorney, and
4. trustees.

The bill establishes the process fiduciaries must follow to gain access to a represented person's digital assets. A fiduciary must send a request to the custodian (i.e., company that owns the server where the digital asset is stored), along with a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. A custodian that receives a request that appears valid is immune from any liability for good faith compliance with such a request.

Under the bill, a fiduciary that manages an account holder's digital assets (e.g., an email account) has the same access rights as the account

holder for the limited purpose of carrying out the fiduciary duty. A service agreement provision that restricts a fiduciary's access to the digital assets held by a custodian is void unless the account holder provides separate affirmative consent.

The bill does not apply to an employer's digital assets used by its employees in the ordinary course of business.

It replaces the provisions under current law that require email service providers to give estate executors and administrators, who present proof of their status, access to, or copies of, the email account of a decedent domiciled in Connecticut when he or she died.

EFFECTIVE DATE: October 1, 2015

§§ 4-7 — FIDUCIARY'S RIGHTS TO ACCESS DIGITAL ASSETS

The bill distinguishes the digital assets a fiduciary may access and the conditions under which he or she may do so.

Access

A fiduciary has the right to access:

1. the content of electronic communications to the extent allowed under federal privacy laws;
2. the "catalog of electronic communications" sent or received by the represented person; or
3. other digital assets in which the represented person has a right or interest (or had a right or interest at the time of death, in the case of a decedent).

Under the bill, "catalog of electronic communications" means the (1) identifying information and email address of each person with whom the account holder communicated and (2) time and date of the communication.

Conditions

The conditions for accessing the digital assets described above vary under the bill depending on the type of fiduciary.

Executors. An executor has access to electronic communications and other digital assets unless a court order or the decedent's will provides otherwise.

Conservators. A court may grant a conservator access to electronic communications and other digital assets after a legal process and a court proceeding, as is required for accessing a protected person's tangible assets under existing law.

Agents. A valid power of attorney gives an agent a general right to access a principal's digital assets. However, specific access to the content of electronic communications (to the extent allowed under federal privacy laws) must be expressly granted to the agent in the power of attorney. (A "principal" is someone who grants authority to an agent through a power of attorney.)

Trustees. Unless otherwise ordered by the court or provided in a trust instrument, a trustee that is an original account holder has the right to access any digital asset held in trust, including access to any electronic communication.

Access to electronic communications by a trustee that is not an account holder is limited to what federal privacy laws allow custodians to share.

§ 8 — FIDUCIARY'S AUTHORITY

Basis

The bill specifies the basis for a fiduciary's authority to access digital assets.

Subject to the terms of a service agreement and copyright and other applicable laws, a fiduciary may take any action regarding digital assets whether acting as an account holder or under the fiduciary's power.

Under the bill, for the purpose of applicable electronic privacy laws, a fiduciary has the account holder's lawful consent for the custodian to disclose the content of electronic communications to the fiduciary.

For the purpose of applicable computer fraud and unauthorized computer access laws, a fiduciary is considered an authorized user and may access an account holder's digital assets.

Terms of Service Agreements

A "terms of service agreement" controls the relationship between an account holder and a custodian. Under the bill, after October 1, 2015, a terms of service agreement does not limit a fiduciary's access to a digital asset unless the account holder agrees to such a limiting provision by a separate affirmative act. Without such separate consent, any provision that limits a fiduciary's access is void, even if the agreement requires notice of a change in the account holder's status.

The bill makes a "choice of law" provision in a terms of service agreement unenforceable if it designates a law that imposes a limitation on a fiduciary's access to a digital asset. (A "choice of law" provision designates the law under which an agreement will be enforced.)

Tangible Personal Property with Digital Capabilities

A fiduciary with authority over a represented person's tangible personal property capable of receiving, storing, processing, or sending a digital asset has the right to access the tangible personal property and any digital asset stored in the tangible personal property.

§ 9 — FIDUCIARY REQUEST AND CUSTODIAN COMPLIANCE

Fiduciary Request

A fiduciary may ask a custodian for access to the digital asset, control of the digital asset, and a copy of the digital asset to the extent permitted by copyright law. Such a request must be accompanied by one of the following documents, depending on the type of fiduciary:

1. a certificate of appointment of the executor or court order;
2. a court-certified order that gives the conservator authority over the digital asset;
3. an original or a copy of (a) the power of attorney that authorizes an agent to exercise authority over the digital asset and (b) a certification, under penalty of perjury, that the power of attorney is in effect; and
4. an original or a copy of the trust instrument or a certification of the trust that authorizes the trustee to exercise authority over the digital asset (see below).

Custodian Compliance in General

A custodian must comply within 60 days after receipt of the request. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

Trustee Certification of Trust

The bill authorizes a trustee to provide a certification of trust instead of the trust instrument when making a request for access to digital assets. The certification must contain the following information:

1. a statement that the trust exists and the date the trust instrument was executed,
2. the settlor's identity and trustee's identity and address,
3. a statement that there is nothing inconsistent in the trust with respect to the trustee's powers over digital assets,
4. a statement of whether (a) the trust is revocable and the identity of any person holding a power to revoke the trust and (b) a cotrustee has authority to sign or otherwise authenticate, and
5. whether or not all cotrustees are required to exercise powers of the trustee.

The trustee must sign or otherwise authenticate the certification. The certification must state that the trust has not been revoked, modified, or amended in a manner that would cause the representations contained in it to be incorrect. The dispositive terms of the trust do not have to be disclosed.

Immunities in Reliance on Certification of Trust

A custodian may require the trustee to provide copies of excerpts from the original trust instrument and any later amendments designating the trustee and conferring on the trustee the power to act in the pending transaction.

A custodian (1) may assume that the certification is factual and (2) is not liable to anyone for acting in reliance on a certification of trust without knowledge that the representations contained in it are incorrect.

A person who in good faith enters a transaction in reliance on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

A person who demands the trust instrument in addition to a certification or excerpts is liable for damages, including attorney's fees, if the court determines that the person did not act in good faith in demanding the instrument.

The bill does not limit a person's right to obtain a copy of a trust instrument in a related court proceeding.

§ 12 — EFFECT ON OTHER LAWS

The bill specifies that in applying and construing its provisions consideration must be given to the need to promote uniformity.

It also specifies that its provisions modify, limit, or supersede the federal Electronic Signatures in Global and National Commerce Act (ESIGN), except for the consumer disclosure requirements (15 USC §

7001, et seq.) (see BACKGROUND). The bill does not authorize the electronic delivery of the notices described under ESIGN, such as court orders, notices, or official documents (15 USC § 7003(b)).

BACKGROUND

ESIGN Act

The ESIGN Act provides that a contract or signature may not be denied legal effect, validity, or enforceability solely because it is in electronic form. A state statute, regulation, or other rule of law may modify, limit, or supersede the ESIGN provisions. It generally does not apply to a contract or other record that governs the creation and execution of wills, codicils, or testamentary trusts (P. L. 106-229).

COMMITTEE ACTION

Judiciary Committee

Joint Favorable

Yea 43 Nay 0 (04/06/2015)